BRIEF

In Support of Petition for Writ of Certiorari.

JURISDICTION.

Certiorari is sought in this case upon the authority of Section 240 (a), as amended [28 U. S. C. A., Section 347 (a) 1], which gives this Court jurisdiction to review any judgment or decree of the United States Circuit Court of Appeals.

The judgment became final on March 27, 1941, when the petition for rehearing was denied.

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals, written by Kerner, J., was filed March 6, 1941, and appears in the appendix hereof. It is reported in 118 Fed. (2nd) 178.

STATEMENT OF THE CASE.

A full statement of the case has been given in this petition under the heading, "Statement of Matters Involved," which, in the interest of brevity, is hereby adopted and made a part of this brief.

ARGUMENT.

I.

The evidence was insufficient to sustain petitioner's conviction, and the judgment should therefore be reversed.

Viewing the evidence as it stood at the close of the entire case, this is what we find. At the inception of the allegedly wrongful scheme this petitioner, who had been for years connected with the enterprise of developing and operating burial parks, was still actively carrying on this undertaking where he had for years previously, in Cleveland, Ohio, where he resided. The burial park there was known as Crown Hill Cemetery.

In early 1936, the evidence showed, he was approached by Stickney, a codefendant, who testified for the Government, with the statement that he, Stickney, wished to terminate his connection with the petitioner's enterprise in Cleveland and start a company of his own in Chicago in collaboration with Mike Gordon, another defendant. This business in which Stickney wanted to embark was the sale of cemetery lots, and to that end he sought this petitioner's views about the idea, and wanted to know on what basis his organization, when formed, could purchase lots from the Crown Hill Trust, who were the selling agents of the lots in Crown Hill Cemetery. Stickney's idea, as conveyed to this petitioner, was that after purchasing the lots the concern that he was going to start in Chicago would then go out and resell them at a profit. At first, this petitioner demurred at Stickney's leaving his connection with the petitioner in Cleveland, but when Stickney was insistent, he yielded, and discussed with him the prices and terms at which the lots would be sold in Chicago.

The upshot was that an agreement was entered into in

writing, it being Government Exhibit 223 (R. p. 170), and Stickney and his associates got under way. Without any participation on this petitioner's part, and without any advice in so far as the evidence discloses, the Chicago undertaking began to blossom with the formation by the Chicago personnel of a Massachusetts Trust to carry on the business under the name of First Commonwealth Trust. The evidence then shows that they launched into various activities, some of which are the basis for the prosecution here undertaken.

As the evidence is examined, we submit that the only connection which it shows this petitioner had with these operations was confined to the following:

(a) The petitioner caused money to be advanced to the Chicago group against future commissions payable to Stickney from transactions he carried on while in petitioner's employ in Cleveland.

(b) This petitioner agreed to sell to the Chicago outfit certain lots in the Crown Hill Cemetery, the details of the agreement being embodied in Government Exhibit 223 (R. p. 170).

There is an entire absence of any substantial evidence which would tend to show that the salesmen and other agents of the First Commonwealth Trust were being directed or counseled by this petitioner or were under this petitioner's supervision or direction, or that he had any authority whatsoever over them.

There is an utter lack of any evidence that this petitioner was to profit by the operations of the Chicago group, except in respect to the possible profit derived from the sale by the Crown Hill Trust of the lots to the First Commonwealth Trust. There is likewise no evidence that this petitioner derived one penny from the income of the First Commonwealth Trust or that he was ever to derive a solitary penny.

The evidence showed no contact between this petitioner and any of the individuals in the Chicago outfit, other than with Stickney, Gordon, Mrs. Nichols and McHenry and Martin. In so far as these contacts were concerned, the evidence showed that they were limited in scope to those matters strictly pertaining to the sale of lots by Crown Hill to the First Commonwealth Trust. There was no evidence of any contact between him and persons allegedly victimized.

Nowhere is there any direct evidence that any of the allegedly fraudulent representations, promises and pretenses were made with this petitioner's knowledge; even more manifest is the total absence of any direct evidence whatever that any such allegedly fraudulent representations, promises and pretenses were authorized by the petioner, or that he ever ratified any of such acts.

The evidence showed the conduct of this petitioner to have been such as would be equally consistent with his innocence as with any possible guilt.

It has been consistently held that in order for circumstantial evidence to support a conviction, **the circumstances must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence.**

Paddock v. U. S., 79 Fed. (2d) 872;
U. S. v. Morley, 99 Fed. (2d) 683.

As was stated in U. S. v. Morley, supra (l. c. 685):

> "If the accused's acts and assurances are reconcilable, then no jury question is presented and the defendant should be dismissed. If, however, there be irreconcilability—if the acts of the accused dispute his assurances of innocence and the conflict is vital, then the court must let the jury weigh the conflicting evidence and decide."

In the case of Mazurosky v. U. S., 100 F. (2nd) 958, the

Ninth Circuit Court of Appeals reversed a conviction for participating in a scheme to defraud and for conspiracy to do the same even though there was proof that there was such a scheme, and that the defendant, in cashing checks derived from the unlawful transactions, might be suspected of having guilty knowledge of the existence of the scheme and conspiracy.

In the case at bar there is at most only suspicion that this petitioner had guilty knowledge of the wrongful activities of the persons connected with the First Commonwealth Trustees.

We respectfully submit, on the record as a whole, the evidence is insufficient to sustain the petitioner's conviction, and the judgment should be reversed.

Clyatt v. U. S., 197 U. S. 207;
Gambina v. U. S., 275 U. S. 310.

II.

The Government's own evidence showed that the petitioner had disassociated himself from the enterprise complained of prior to the time when all the mailings occurred which are the basis of the several counts of the indictment, and hence the conviction should not stand.

This evidence showed, as pointed out in the opinion of the United States Circuit Court of Appeals (R. p. 9), that petitioner resigned from Crown Hill, Inc., and Crown Hill Trust on December 15, 1936. All the mailings used as a basis for the indictment occurred after that date.

If a scheme had actually existed as charged in each of the counts of the indictment, but before the particular offense had actually been committed (and there was no offense until the mails were used) this petitioner severed all connection with the scheme, then anything thereafter

done by others could not operate to charge him with responsibility for commission of the crime.

See

Marino v. U. S., 91 Fed. (2d) 691;
Miller v. U. S., 277 Fed. 721;
U. S. v. Britton, 108 U. S. 199, 2 S. Ct. 531, 27 L. Ed. 698;
Dimond v. Shine, 199 U. S. 88, 125 S. Ct. 766.

As stated in 15 C. J. S. 1110:

> "Where an overt act is essential to a conspiracy, a conspirator may avoid guilt by withdrawing from the conspiracy prior to the commission of an overt act."

The Court of Appeals, however, in ruling against this contention, stated in its opinion (R. p. 9):

> "The record discloses that Appellant Beck resigned from Crown Hill, Inc., and Crown Hill Trust on December 16, 1936, but it also appears that in May, 1937, at the time that Commonwealth closed its offices (after the date alleged in the first and last count of the indictment), he informed Mrs. Nichols to re-deed those lots which remained unsold by Commonwealth to the First Refunding Corporation of Cleveland."

It would appear from the foregoing that the Court of Appeals conceded that, except for the incident in May, 1937, above referred to, a complete and effectual withdrawal would have been established by petitioner's resignation from Crown Hill, Inc., and Crown Hill Trust on December 15, 1936, as shown by the Government's own evidence. Does, then, the testimony of Mrs. Nichols about the later occurrence make for a jury question? Certainly what thus transpired in May could not be said to be in furtherance of the conspiracy to defraud. Rather, it would appear to be just to the contrary. Even if it is not actually additional evidence confirming the previously effected withdrawal, it does not amount in fact to any

evidence, we believe, which tends to put in doubt in any way the previously positive withdrawal. And, if we are correct in assuming that because the Government's own evidence showed the disassociation of petitioner from the unlawful enterprise in December, 1936, it was sufficient to remove that as a jury question, then we earnestly urge that the happening in May, shown above, is also not sufficient to create a jury question. On this point we respectfully submit that the Court of Appeals seemed to have given the particular episode an undue interpretation which has had the effect of putting upon this petitioner responsibility for the alleged acts, including mailings, occurring after he had actually severed completely his connections with the alleged fraudulent activities.

III.

The petitioner was deprived of a fair and impartial trial by reason of the circumstances surrounding the calling as a witness and the giving of testimony by the codefendant, Robert Stickney.

At the outset, we should like to make it clear that we do not wish to be understood as contending that generally speaking the Government would not have had the right to use Stickney as its witness. On the contrary, we concede that in an ordinary situation that right would not be open to question. But the precise occurrence in this case was of such unusual and prejudicial character as required the granting of petitioner's motion to withdraw a juror and declare a mistrial.

The setting at the time he was called was this: the case had been on trial for some four days. Stickney was in continual conference with his codefendants and with counsel, including this petitioner's counsel, and up to the time Stickney was called by the Government neither this

petitioner nor his counsel had any prior knowledge or intimation that he was to be called. The scene thus enacted before the jury tended to deprive this petitioner of a fair trial. The subsequent testimony by Stickney, which the Government attorneys regarded as of sufficient importance to use, cannot have but led the jury to conclude that the sins of Stickney were likewise the sins of Beck. They could well have assumed that Stickney and Beck had a common cause, from which Stickney was bolting. The confidential, if not privileged, character of the subjects of discussion in the numerous conferences that had occurred previously were such as to clearly put this petitioner at a disadvantage. Proper preparation of the defense in this situation could not but have been seriously hampered.

In the case of Heitler v. U. S., 244 F. 140, the United States Court of Appeals for the same circuit had before it a situation possessing some similarities with the one which here arose. There, counsel for one of several defendants, prior to the start of the trial, suspecting that one of the codefendants was going to testify for the Government, inquired of the prosecutor whether he was correct on this point, and was answered in the negative. Notwithstanding the denial, petitioner's counsel still remained suspicious. After the case was under way the particular codefendant did in fact take the stand as a witness for the Government. In refusing to uphold the petitioner's contention that this use of a codefendant as a witness after the trial had started was unfair, the Court pointed out, l. c. 142:

> "Under the facts indicated and particularly with the attention of the Prosecutor challenged thereto, the Prosecutor should frankly have stated in the beginning that the Government expected to call these defendants as witnesses and that Rosenzwig had been promised immunity for his testimony. He might fur-

ther, with entire propriety, before the trial began, have asked severance (which under the circumstances would undoubtedly have been granted) as to the defendants who were to testify and thus have avoided the possible unfairness to the other defendants in leaving the Court without discretion to separate witnesses who remain only in name as defendants on trial. **If, from the situation disclosed, the record did not leave it clear that no harm came to plaintiff in error through the Prosecutor's failure to so disclose and ask severance, it would be the duty of this Court to set aside the judgment.**" (Emphasis ours.)

Further:

"**Bachrach's suspicion** that the codefendants would testify for the Government **was voiced from the start**; so it is not supposable that **through reliance on the bona fides of their defense he was tricked into any harmful co-operation with them.**" (Emphasis ours.)

In the instant case this petitioner and his counsel were certainly misled, if not actually tricked, into harmful co-operation with Stickney, who was not represented by counsel.

Besides, the effect upon the jury of the reaction produced upon his codefendants and their counsel by the surprise calling of Stickney; the objection made in open court to his testifying for the Government, and the undoubted indication of surprise and concern and even confusion on the part, among others, of this petitioner and his counsel, cannot but have had a harmful and damaging effect upon the jury.

In this connection it would seem only reasonable to conclude that the jury was left with an indelible impression that if Stickney was guilty, his codefendants were also guilty, and possibly also, that Stickney's testifying as a Government witness was impelled by a desire to have the

truth come out, and all in all, the incident must have attached to his testimony in the minds of the jury a significance which it would otherwise not have had. The occurrence, we submit, does not conform to the doctrine of according a fair trial to the accused, and in this case it was undoubtedly prejudicial and should compel a setting aside of the conviction.

The case of Minker v. U. S., 85 Fed. (2nd) 425, in addition to the Heitler case, would seem to point to the principle which should apply.

Mr. Eben, Assistant United States Attorney, in charge of the prosecution, in the oral argument before the Court of Appeals, attempted to differentiate between the situation present when Stickney was called as a witness and that which existed in the Heitler case (244 Fed. 140). He told the Court that there was no agreement before the trial commenced that Stickney would be called as a witness in contrast to what he said was the situation in the Heitler case. He then said that what actually took place was that before the trial, Stickney had, in fact, offered to testify for the Government, but that he, Eben, would not agree to use him unless Stickney would agree to plead guilty, and this, Eben stated, Stickney was unwilling to do. In this situation, according to Eben, he had no intention of using Stickney when the trial commenced. Yet it will be noted by the Court that what had thus transpired was not disclosed to the defendants, including petitioner, and that Stickney afterward, without any counsel to represent him, became and remained for four trial days closely associated with his codefendants in the conduct of the defense up to the very minute of his being called as a Government witness, conferring all this time with the other defendants and with their counsel and receiving the full and free cooperation of these defendants and their counsel, with the

defendants, including petitioner, and their counsel being all the while in complete ignorance of what had occurred between Stickney and the prosecution. Then, despite their supposed previous unwillingness to use Stickney as Government witness, except on condition that he plead guilty, the Government, because his testimony was valuable to them, saw fit to, and did, call Stickney as a witness, notwithstanding he still did not consent to plead guilty as the Government had previously insisted that he do. In this situation, we submit, there was little, if any, practical difference between what happened in the Heitler case and what occurred here.

The Court of Appeals, however, in its opinion (p. 7), refers to this petitioner's argument on the subject and dismisses it with this comment, "The trouble with this argument is that there is nothing in this record indicatng that Beck has been prejudiced; consequently, we are unable to say that Beck was deprived of a fair and impartial trial." We earnestly submit to your Honors, in all sincerity, that, in our humble judgment, the record does in fact indicate that petitioner was prejudiced, if we here adopt the same standard of determining this question as was used in the Heitler case, supra. The Court there said, in a situation somewhat similar, l. c. 142:

> "If, from the situation disclosed, the record did not leave it **clear that no harm came** to plaintiff in error through the Prosecutor's failure to so disclose and ask severance, it would be the duty of this court to set aside the judgment." (Emphasis ours.)

And again:

> "Bachrach's suspicion that the codefendants would testify for the Government was voiced from the start; so it is not supposable that **through reliance on the bona fides of their defense he was tricked into any harmful co-operation with them.**" (Emphasis ours.)

It seems to be the purport of the decision in the Heitler case, as we view it, that if there had been any doubt that harm had resulted, the Court would have reversed and remanded the case; and such harm could have come, as we understand the decision, if "through reliance on the bona fides of their defense he was tricked into harmful co-operation with them." If this interpretation of the Court's decision in the Heitler case is correct, then it would follow that the very elements which were pointed out as being lacking there, but which are, however, present here, would seem to call for a reversal in the instant case.

Here, there was reliance on the bona fides of the Stickney defense, and this petitioner was in effect tricked into harmful co-operation with him.

Besides, the reaction necessarily produced upon the defendants and their counsel by the surprise calling of Stickney as Government witness, including the undoubtedly resulting astonishment, confusion and concern, could not but have forcefully and indelibly impressed the jury with the conclusion that all the defendants must be guilty (as they found Stickney himself was) so as to deprive the petitioner of a fair trial. See Minker v. U. S. A., 85 Fed. (2nd) 425.

Mention was made by Government's counsel in the oral argument before the Court of Appeals that the record failed to show that the defendants and their counsel were so affected at the surprise calling of Stickney, but even so, we respectfully submit that judicial notice should be taken of the effect produced by this totally unexpected happening at the time, and, under the circumstances which existed, since it is common knowledge that human emotions would so react in such a situation. See Jones on Evidence (2nd Edition), Sec. 458; 23 C. J., p. 149, Sec. 1970.

CONCLUSION.

It is respectfully submitted, in view of the foregoing, that this case is one calling for the exercise by this Court of its supervisory powers by the granting of a writ of certiorari as prayed for in the petition, and, thereafter, for a reversal of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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